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Office of Administrative Law Judges
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OWCP NO.: 01-187321

BRB NO.: 03-0345

In the Matter of

FRANCIS E. REED
Claimant

v.

BATH IRON WORKS CORPORATION
Employer

and

LIBERTY MUTUAL INSURANCE COMPANY
Carrier

Appearances:

Janmarie Toker (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Kevin M. Gillis (Troubh, Heisler & Piampiano), Portland, Maine, for the Employer

Before: Daniel F. Sutton, Administrative Law Judge

DECISION AND ORDER ON REMAND DENYING BENEFITS

I. Statement of the Case

This matter, which arises from a claim for worker's compensation benefits filed by Francis E. Reed ("Reed" or "the Claimant") against the Bath Iron Works Corporation ("BIW") under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq.* (the "LHWCA"), is before the Office of Administrative Law Judges a second time pursuant

to a remand from the Benefits Review Board (the Board). *See Reed v. Bath Iron Works Corp*., 38 BRBS 1 (Feb. 10, 2004).

Reed went to work for BIW in 1951 and worked there for over 44 years as a rigger, erector and crane operator until he retired in February 1996 at the age of 61. He had a number of work-related injuries while working for BIW, including a back injury on November 12, 1985 which caused him to miss about two weeks of work. He returned to work from this injury, but continued to experience pain and other symptoms and suffered an aggravation or re-injury in 1990, missing work time again for which he was paid compensation by BIW. He filed a claim over the 1985 back injury under the Maine workers' compensation statute, and he was awarded compensation for a five percent permanent partial back impairment in July 1992. Following his retirement in 1996, Reed began collecting retirement benefits from BIW as well as Social Security payments. He worked briefly as a school bus driver during the fall of 1996 but has not been employed since that time.

After retiring from BIW, Reed encountered additional problems with his back, leading to surgeries in 1998 and 1999. In August 1999, he received a settlement payment of $25,000.00 pursuant to his state compensation claim based on an increase in his back impairment due to the 1990 work-related aggravation of the 1985 injury. Reed then claimed total disability compensation under the state statute for periods subsequent to his retirement from BIW. In November 1999, a state hearing officer found Reed's back surgeries and subsequent disability related to the November 1985 work injury and awarded him compensation for two closed periods of total disability following the surgeries. However, Reed's claim for continuing total disability compensation was denied based on the hearing officer's finding that he failed to rebut the presumption under the state statute that a person receiving non-disability pension or retirement benefits has no loss of wage-earning capacity due to a work-related injury or disease. BIW's compensation payments pursuant to the state hearing officer's award ended on December 2, 1999. Four months later, in April 2000, Reed filed his LHWCA claim seeking total disability compensation from the date of his retirement in February 1996.

In my previous decision, I found that Reed's LHWCA claim was untimely because it was not filed within one year of December 21, 1998, the date on which I found that he became aware that his back condition is related to the November 1985 work-related injury to his back, as required by section 13(a) of the LHWCA.[1] In denying the claim, I rejected Reed's argument that the language of section 13(a) allowing for the filing of a claim within one year of the last payment of compensation *without an award*, tolled the running of the one-year filing limitation

[1] Section 13(a) states,

> (a) Time to file. Except as otherwise provided in this section, the right to compensation for disability or death under this Act shall be barred unless a claim thereof is filed within one year after the injury or death. If payment of compensation has been made without an award on account of such injury or death, a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or death occurred. The time for filing a claim shall not begin to run until the employee or beneficiary is aware, or by the exercise of reasonable diligence should have been aware, of the relationship between the injury or death and the employment.

33 U.S.C. § 913(a) (italics supplied).

period because BIW had made compensation payments pursuant to the state award. I also found that none of the other tolling provisions in the LHWCA could save Reed's claim, and I denied his request for reconsideration of my timeliness ruling. Reed appealed to the Board. After considering principles of statutory construction and the body of case law addressing voluntary and involuntary compensation payments under the LHWCA, the Board reversed my timeliness finding and remanded the claim for adjudication on the merits. Specifically, the Board held,

> [P]ayments made by employer pursuant to a state award are payments "without an award" under the Act. Thus, we hold that employer's last payment of compensation on December 2, 1999, was a payment which served to toll the one-year statute of limitations in Section 13(a) until one year from that date. Accordingly, claimant's claim filed on April 24, 2000, is timely as a matter of law.

38 BRBS at 6. With respect to the merits, the Board additionally addressed BIW's argument on appeal that collateral estoppel effect should be given to the state hearing officer's finding that claimant voluntarily retired from BIW. The Board held that this finding was *dictum* which is not entitled to collateral estoppel effect because the finding was not essential to the hearing officer's judgment. 38 BRBS at 3, citing *Bath Iron Works Corp. v. Coulombe*, 888 F.2d 179 (1st Cir. 1989). Since the hearing officer's finding that the Claimant had voluntarily retired from BIW was not necessary to her denial of continuing compensation for failure to rebut the state statute's presumption, the Board held that "her finding does not preclude claimant from litigating the issue of his entitlement to benefits under the Act." *Id.*

Upon return to the case file, an order was issued on June 3, 2004, directing the parties to notify the Court within 30 days whether they were able to resolve the claim in view of the passage of time and the Board's disposition of the collateral estoppel and timeliness issues and, if not, whether they are able to offer any additional stipulations.[2] The parties advised that they were unable to resolve the claim or offer any additional stipulations. Based on the Claimant's unopposed request, the parties were granted leave until August 20, 2004 to file supplemental briefs. The briefing deadline was extended several times, ultimately to January 10, 2005, on the Claimant's unopposed requests. Briefs were received from both parties, and the record is now closed.

After consideration of the evidence and the parties' arguments, I find that the weight of evidence does not support Reed's claim that he stopped working at BIW in February 1996 because of his work-related back injury. Accordingly, I conclude that his claim for disability compensation, which is based upon a non-scheduled traumatic injury, must be denied as he has not proved that he suffered any loss or wage-earning capacity due to a work-related injury.

II. Supplemental Findings of Fact and Conclusions of Law on Remand

BIW's principal defense to the merits of the claim is its contention that Reed is not entitled to disability compensation payments because the evidence establishes that he voluntarily retired in 1996 and, therefore, cannot show that he suffered any loss in earning capacity due to

[2] The case file was returned to the Office of Administrative Law Judges on May 27, 2007.

his back injury at BIW. Emp.Rem.Br. at 2-3. BIW also raises issues with respect to the nature and extent of Reed's disability, and it claims a credit against any disability compensation awarded under the LHWCA based upon its payments of state disability compensation. Emp.Rem.Br. at 3. Reed's attorney concedes in her supplemental brief that "the evidence shows that Mr. Reed has voluntarily retired." Cl.Rem.Br. at 4. Nevertheless, Reed argues, by way of analogy to the "occupational disease" provisions of the LHWCA which specifically provide for payment of disability compensation to voluntary retirees, that any question as to the nature of his retirement only goes to the applicable average weekly wage and that he has made out a *prima facie* case for total disability compensation, which BIW has not rebutted, by showing that he cannot return to his usual employment. *Id.*[3]

Contrary to the implication of Reed's argument, the Board has held that the statutory provisions for compensating retirees with occupational disease are not applicable to a claimant who has suffered a traumatic injury. *Hoffman v. Newport News Shipbuilding & Dry Dock Co*., 35 BRBS 148, 149-150 (2001). In *Hoffman*, which involved a claim for post-retirement disability compensation based on a work-related traumatic knee injury, the Board affirmed the ALJ's denial of continuing compensation for loss of wage-earning capacity, distinguishing the occupational disease cases relied on by the claimant:

> In contrast, in the instant case, claimant sustained a traumatic injury, returned to work and chose to accept a retirement package, which was a decision the administrative law judge rationally found unrelated to his knee injury. Following retirement at age 60, he was not employed again, and thereafter sustained a worsening of his condition. The increased impairment, however, did not increase claimant's loss of wage-earning capacity. Thus, claimant has not met his burden of establishing he has a loss in wage-earning capacity due to his injury.

Id. at 150 (transcript citations omitted). *Hoffman* therefore places the burden on Reed to establish that he has suffered a loss in wage-earning capacity that is due to the work-related back injury that he sustained while employed by BIW rather than his decision in 1996 to retire and collect BIW pension payments and Social Security retirement benefits. *Cf. Harmon v. Sea-Land Service, Inc*., 31 BRBS 45, 48 (1997) (inquiry into the nature of a worker's retirement is irrelevant when the facts show that the worker suffered a disabling injury, underwent surgery and never returned to work before becoming eligible for and accepting a longevity retirement).[4]

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[3] The Congress amended the LHWCA in 1984 to include "express provisions for the payment of benefits to retirees who become disabled during retirement as a result of an occupational disease." *Bath Iron Works Corp. v. Director, OWCP*, 942 F.2d 811, 815 (1st Cir. 1991), quoting 130 Cong.Rec. 26,300 (1984) (remarks of Sen. Hatch), *aff'd*, 506 U.S. 153 (1993). Under the amendments, a retiree whose occupational disease occurs within one year of retirement receives disability compensation based upon an average weekly wage equal to one fifty-second part of his average annual earnings during the 52-week period preceding retirement, while a retiree whose occupational disease occurs more than one year after retirement has his or her compensation based on the national average weekly wage, which is determined by the Secretary of Labor pursuant to section 6(b) of the LHWCA, applicable at the time of injury. 33 U.S.C. § 910(d)(2). Reed has not argued or introduced any evidence to show that his back condition constitutes an occupational disease within the meaning of the LHWCA.

[4] *Harmon* is distinguishable from the instant case where Reed returned to work after his work-related back injuries and later became eligible for and accepted a longevity retirement.

Reed testified that his back was bothering him all the time and that he'd had enough of the backache by the time that he decided to retire from BIW. Hearing Transcript at 26-27. He was then sixty one and one half years of age which qualified him for a BIW pension, and he also immediately began collecting Social Security retirement benefits. Hearing Transcript at 34-35.[5] As discussed above, Reed went back to work after retiring from BIW, driving a van for a local school system during the fall of 1996. He testified that he worked at this job for about 12 weeks, earning $1,700.00, but said that he left the driving job because his back was bothering him. Hearing Transcript at 27-28, 35. On cross-examination, he acknowledged that a report of a medical examination in October 1996 states that he was driving the school bus only until Christmas when his wife was going to retire, but he insisted, "I wanted to stop working because my back bothered me." Hearing Transcript at 35-36. Reed's testimony thus suggests that he stopped working at BIW in 1996 because of his ongoing back symptoms and thereby incurred a loss of earning capacity that is attributable to his work-related back injury. However, his account of the reasons for leaving employment at BIW is not supported by the medical records.

Records from BIW's First Aid Department, which monitored Reed's medical condition following the 1985 back injury, show that he missed additional time from work in 1990, 1991 and 1992 due to work-related aggravations of his low back symptoms. Claimant's Exhibit 16 at 191-196. At the time of the 1992 incident, he reported that his back symptoms occasionally "flared up" while working in the crane without any specific injury, causing him to seek medical treatment and take time out of work. *Id.* at 195. He was off duty for about three weeks in 1992, during which he underwent manipulation treatment by a chiropractor. *Id.* at 196. When he returned to BIW on April 14, 1992, he reported feeling "much better" and was placed on limited duty for four days. *Id.* at 197. On April 20, 1992, he was returned to full duty as a crane operator without limits. *Id.* at 198. There is no evidence that the Claimant returned to the First Aid Department with any complaints or that he was placed on work restrictions at anytime between April 20, 1992 and his retirement in February 1996.

The records from Reed's treating chiropractor, Timothy Dennis, D.C., also contain no recommendations for work restrictions between 1992 and 1996, and they show no more than occasional complaints of morning lower back stiffness. Claimant's Exhibit 13 at 119-122. Similarly, Edward Kitfield, M.D., who saw Reed regularly between 1990 and 1996 as his primary care physician, recorded neck, knee and breathing problems after 1992 but no complaints of back pain. Claimant's Exhibit 17 at 199-202. Reed reportedly told Dr. Kitfield during a physical examination on April 1, 1994 that he was hoping to retire from BIW in a couple of years but did not link his decision to any medical factors including his back. *Id.* at 212. As of a December 2, 1994 physical examination, Dr. Kitfield reported that Reed enjoyed his job working in a crane at BIW and that "[h]e is really feeling quite well." *Id.* at 216. Dr. Kitfield did not even mention Reed's back in his diagnostic impressions which included asymptomatic chronic bronchitis secondary to smoking, degenerative joint disease of the knees and asbestosis. *Id.* Dr. Kitfield was again silent with respect to any back problems when he examined Reed on October 25, 1996, although he did report that Reed complained of left knee and ankle pain, stiffness in his hips and generalized aches, pains and stiffness. *Id.* at 217. Although Dr. Kitfield wrote in this report that Reed was planning to stop working as part-time bus driver when his wife

[5] The state hearing officer found that Reed was eligible to retire from BIW in September 1994 but continued working in order to increase his retirement benefits. Claimant's Exhibit 1 at 5.

retired at Christmas, there is no reference to back problems despite Reed's insistence that his back pain caused him to leave the driving job. *Id*.

In my view, the fact that Reed worked at his regular job as a crane operator from April 1992 until February 1996 without any restrictions, in combination with the absence of any reference in the medical records to back problems between 1992 and 1996, undercuts Reed's position that his decision to retire from BIW in February 1996 was motivated by his back injury. Rather, I find that Reed had decided as early as April 1994 to retire from BIW in a few years, that he became eligible to retire in September 1994 but continued working to increase his benefits, and that his decision to retire in February 1996 was based upon factors unrelated to his back injury. Since Reed has not shown on this record that his decision to retire from BIW was motivated by a work-related injury, I am constrained to conclude under Hoffman's rationale that he has not established that he suffered a compensable loss in wage-earning capacity that is attributable to a work-related injury. Consequently, his claim for post-retirement disability compensation must be rejected.

It is recognized that denial of Reed's claim produces a harsh result in comparison to the treatment the LHWCA affords to retirees who develop work-related occupational diseases or permanent impairments involving body parts listed in the schedule found in section 8(c) of the LHWCA. As noted above, a worker who voluntarily retires and later develops a work-related occupational disease is eligible to receive disability compensation payments under the 1984 amendments to the LHWCA without regard to economic factors. *See Frawley v. Savannah Shipyard Co*., 22 BRBS 228, 230 (1989). And, a retiree who later develops an impairment to a body part covered by the LHWCA's schedule, 33 U.S.C. §§ 908(c)(1) – (20), as was the case in *Hoffman*, may recover compensation based on the extent of impairment without any showing of economic loss. *Hoffman* at 150 (observing that the claimant was "on an equal footing with a voluntary retiree who becomes aware thereafter of an occupational disease" because he had received permanent partial disability compensation based on the degree of physical impairment to his leg, including the increased impairment arising after his retirement, pursuant to sections 8(c)(2) and (19) of the LHWCA). *See also Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 274 (1980) (*PEPCO*) (discussing the distinction between scheduled injuries, for which a claimant is limited to the compensation provided in the statutory schedule, and injuries outside the schedule, for which the LHWCA provides a potentially higher recovery by incorporating economic factors); *Burson v. T. Smith & Son, Inc*., 22 BRBS 124, 127 (1989) (voluntary retiree entitled to compensation under the LHWCA schedule for a post-retirement impairment resulting from a work-related toe and foot injury). In this case, however, Reed sustained a traumatic injury to his back which is neither an occupational disease nor a body part covered by the schedule, and the case law is clear that compensation entitlement for a back injury requires a showing of loss of wage-earning capacity caused by the injury. *See Long v. Director, OWCP*, 767 F.2d 1578, 1580-1582 (9th Cir. 1985); *Hole v. Miami Shipyards Corp*., 640 F.2d 769, 772-73 (5th Cir.1981). While troubled that denial of post-retirement compensation leaves Reed in a disadvantageous position vis-à-vis a retiree afflicted with a work-related occupational disease or impairment resulting from a scheduled injury, I am mindful that an administrative law judge has no authority to ignore the intent of Congress in an effort to achieve what he or she perceives to be a more just outcome in a particular case. *See PEPCO*, 449 U.S. at 284 (1980) ("sympathy for

the actual plight of the individual litigant in the case before us . . . is an insufficient basis for approving a recovery that Congress has not authorized.").[6]

III. Order

Having failed to establish that he suffered any loss of wage-earning capacity due to his back injury at BIW, Reed's claim for post-retirement disability compensation is **DENIED**.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts

[6] The evidence allows for little doubt that Reed would prevail on his claim for post-retirement disability compensation but for the finding that his decision to retire from BIW was unrelated to his back injury. As discussed above, he has undergone two back surgeries since retiring from BIW, and his treating neurosurgeon had provided an opinion, which is not outweighed by any substantial contrary evidence, that it is more likely than not that Reed's post-retirement back problems are causally relayed to the 1985 back injury. Claimant's Exhibit 13 at 97. *See also* Claimant's Exhibit 11 at 75. Additionally, it is clear from the medical reports and Reed's testimony that he cannot return to his usual employment as a crane operator, and BIW has offered no evidence of suitable alternative employment.